NA 04-0007-C h/h Marion v. City of Corydon
Judge David F. Hamilton Signed on 06/03/08

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

TRENT MARION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 4:07-cv-0003-DFH-WGH
	)	
THE CITY OF CORYDON, INDIANA, et al.,	)	
	)	
Defendants.	)	

ENTRY ON MOTION TO RECONSIDER AND RELATED MATTERS

The court previously granted the motions for summary judgment filed by most of the defendants. *Marion v. City of Corydon*, 2008 WL 763211 (S.D. Ind. March 20, 2008). Not all defendants had moved for summary judgment, and the court ordered plaintiff to show cause why summary judgment should not be granted in favor of the remaining defendants. Plaintiff responded and the remaining defendants filed replies. Plaintiff also filed a motion to reconsider the grants of summary judgment. He supported the motion with his own affidavit, providing for the first time his own testimony about what happened during the high speed chase that ended when police officers shot and seriously injured him. The prevailing defendants responded to the motion to reconsider and filed their own motions seeking entry of separate final judgments in their favor under Rule 54(b) of the Federal Rules of Civil Procedure. As explained below, the court denies plaintiff's motion to reconsider, grants summary judgment in favor of the

remaining defendants, and directs the entry of final judgment in favor of all defendants as to all claims.

I. *Plaintiff's Motion to Reconsider*

In the decision granting summary judgment, the court reviewed in detail the testimony from defendants and other witnesses and the video and audio recordings of the chase that ended with the officers firing their weapons at plaintiff. The court noted that plaintiff had offered no contradictory evidence at all. He had not even submitted his own affidavit. See 2008 WL 763211, at *4 n.5. The defendants' evidence was undisputed, and the court explained why the undisputed facts showed that no officer violated plaintiff's constitutional rights by firing their weapons at him.

With his motion to reconsider, plaintiff submitted his own affidavit signed on April 4, 2008. Some portions of that affidavit are simply absurd. For example, Paragraphs 6 and 7 state: "Throughout the duration of the pursuit my vehicle did not strike or cause damage to any civilian vehicle. The operation of my vehicle did not place any civilian drivers or occupants in danger." Any reasonable juror who watched the video recordings in evidence, especially the early portions of the chase in Kentucky, would have to reject the latter assertion. In his effort to flee from the police, plaintiff endangered many "civilian" drivers and passengers. See *Scott v. Harris*, 550 U.S. —, —, 127 S. Ct. 1769, 1776 (2007) (explaining that, in deciding

a motion for summary judgment, the court can and should accept as true the facts depicted by unchallenged video recordings where a reasonable jury could not reject that evidence). Plaintiff's careful, disingenuous, and artful emphasis on "civilians" also asks the court to put on blinders and to ignore the dangers that plaintiff posed to the police officers who were doing their jobs.

The most significant portion of the affidavit is Paragraphs 15 and 16: "As ordered by the police officers, I raised my hands above my head in an attempt to surrender. I did not physically resist arrest or assault the police officers in any way. Despite my compliance with the officers' orders to place my hands above my head, I was suddenly and without warning fired upon." That testimony is contradicted by numerous witnesses, though of course such conflicts in the evidence could not be resolved on summary judgment. In the court's view, Marion's key testimony is also flatly contradicted by the undisputed video and audio recordings. Those recordings show that Marion's vehicle was continuing to move in the highway median even after shots had been fired and as an officer announced over the radio that shots had been fired. See App. K at 16:20:50. Marion's testimony in Paragraphs 15 and 16 therefore would not present a *genuine* issue of material fact. See *Scott v. Harris*, 127 S. Ct. at 1776.

Even if Marion's testimony would have been enough to present a genuine issue at the time of the original briefing, his affidavit is not properly before the court. It simply came too late. Summary judgment is a critical, often decisive

stage of a lawsuit. It is not a dry run, a dress rehearsal, or a test drive. "A party seeking to defeat a motion for summary judgment is required to 'wheel out all its artillery to defeat it.'" *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996); *Fast Tek Group, LLC v. Plastech Engineered Products, Inc.*, No. 1:05-cv-1868, 2006 WL 3409171, at *6 (S.D. Ind. Nov. 27, 2006) (denying motion to reconsider summary judgment based on newly submitted evidence that had always been available to losing party).

To support his motion, plaintiff invokes Rule 60(b)(6) of the Federal Rules of Civil Procedure and the interests of justice. Strictly speaking, Rule 60(b)(6) does not apply here because the court has not yet entered a final judgment as to any party or claim. The applicable rule is Rule 59, which provides a vehicle for asking a court to reconsider a judgment or a non-final decision, or the court's inherent power to revisit interlocutory decisions. See *Peterson v. Lindner*, 765 F.2d 698, 704 (7th Cir. 1985). Under any of these powers, however, essentially the same substantive considerations apply, though there are important differences in terms of timing and appellate review, see, *e.g.*, *Obriecht v. Raemisch*, 517 F.3d 489, 493-94 (7th Cir. 2008). Motions under Rule 59 allow a party to direct the district court's attention to newly discovered material evidence or a manifest error of fact or law, so that a district court can correct its own errors and avoid unnecessary appeals. *E.g.*, *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996) (affirming denial of relief where supposedly new evidence had been available to party during original summary judgment proceedings). Rule 59 "does not provide a vehicle for

a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment." *Id.*; accord, *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995).

Rule 60(b)(2) provides a basis for setting aside a final judgment on the basis of new evidence that "could not have been discovered" earlier with reasonable diligence. That provision offers guidance for this situation, where plaintiff offers new evidence to set aside a grant of summary judgment. Under Rule 60(b)(2), there are five prerequisites:

> (1) the evidence was discovered following trial; (2) due diligence on the part of the movant to discover the new evidence is shown or may be inferred; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that a new trial would probably produce a new result. *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 78 F.3d [285, 293-94 (7th Cir. 1996)]. If any of these prerequisites is not met, the plaintiff cannot prevail on her motion.

Harris v. Owens-Corning Fiberglas Corp.,102 F.3d 1429, 1434 n.3 (7th Cir. 1996) (affirming denial of relief).

In this case, plaintiff Marion fails to meet the first and second criteria, even if the court assumed he could satisfy the others. His own testimony has always been available to him. He has offered no excuse – he has offered not even an explanation – for his failure to come forward with his affidavit during the original summary judgment briefing. Allowing Marion to start over, in effect, would create

incentives that would undermine the courts' ability to administer justice in an orderly and fair way and would add even more to the costs and delays of litigation. Even under the more flexible power a court has to revisit its own interlocutory decisions, it has often been said that a federal district court's decision is not a "first draft" subject to a prolonged cycle of further comment, debate, and revision. *E.g.*, *Pickett v. Prince*, 5 F. Supp. 2d 595, 597 & n.3 (N.D. Ill. 1998) (denying motion to reconsider and explaining that district court opinions "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure"), quoting *Quaker Alloy Casting Co. v. Gulfco Industries, Inc.*, 123 F.R.D. 282, 288 & n.9 (N.D. Ill. 1988) (original source of quotation cited or quoted in hundreds of decisions; denying motion to reconsider interlocutory grant of summary judgment where losing party offered supposedly new evidence that had been available to it during earlier briefing).

Moreover, plaintiff's invocation of the "interests of justice" has a deep vein of irony in it. When plaintiff was fleeing the police, and when he was endangering them and hundreds of innocent passers-by with his reckless and desperate driving (shown clearly on the videos), justice was the last thing Mr. Marion wanted. After the police eventually caught up with him, he repeatedly and continuously failed to pull over and stop. His explanation in his affidavit, that he was afraid after Officer Sadler fired a rifle at him at approximately the 103 mile marker, refers to events that occurred after he had already led many police officers

on a dangerous high speed chase for approximately 18 miles. The interests of justice do not require the court to allow Mr. Marion to start over in this case.

II. *Summary Judgment for the Remaining Defendants*

The court's previous decision did not expressly resolve the plaintiff's claims against the Louisville-Jefferson County Metro Government (the current name of what had been the City of Louisville) and its unknown officers, and against the unidentified troopers of the Indiana State Police and Trooper Laura Hess, the only trooper plaintiff identified as a defendant within the two year limitation period. Those defendants had not filed their own motions for summary judgment. The court directed plaintiff to show cause why summary judgment should not be entered against him on those claims based on the court's resolution of the other defendants' motions. For the reasons set out in the original entry, the undisputed facts show that there was no violation of plaintiff's constitutional rights by any law enforcement officer from any department. The court sees no valid reason for revisiting that conclusion, for reasons discussed above. The remaining defendants are therefore also entitled to summary judgment.

The Louisville defendants are also entitled to summary judgment on independent grounds. Plaintiff points out that the Louisville officers started the pursuit and sought help from other departments. That does not matter. As the court explained in the original entry, unsuccessful efforts to stop a fleeing suspect

are not treated as seizures under the Fourth Amendment. See 2008 WL 763211, at *6. Plaintiff suggests that he should have been allowed to take discovery to pursue a theory that Louisville officers violated his rights by failing to intervene to prevent the shootings that actually wounded him. There is no evidence that any Louisville defendant was on the scene at the time of the only "seizure" for purposes of the Fourth Amendment, the gunshots that actually wounded plaintiff and stopped his flight in the median at mile marker 103. The undisputed evidence shows that no Louisville officer was present at the time of the final shooting; they had abandoned the chase and left that role to the various Indiana officers. *Id.* at *2.[1]

[1]In addition, claims against any individual Louisville officers would be untimely at this point, for naming a "John Doe" defendant as a placeholder does not toll the two-year statute of limitations. *E.g.*, *Roddy v. Canine Officer*, 293 F. Supp. 2d 906, 913 (S.D. Ind. 2003). Plaintiff also has not argued that there was any policy or custom in the Louisville police department not to intervene in such settings. It is hard to imagine that there might have been, such that any alleged violations of plaintiff's constitutional rights might have been caused by a municipal policy, custom, or practice under *Monell v. Department of Social Services of New York*, 436 U.S. 658, 694 (1978).

III. *Entry of Final Judgment*

The defendants whose motions for summary judgment were granted in March have moved for entry of separate final judgments in their favor pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. This case would not meet the standards of Rule 54(b) because plaintiff's claims against all defendants are inextricably tied together in the same sequence of events. See *ODC Communications Corp. v. Wenruth Investments*, 826 F.2d 509, 512 (7th Cir. 1987) (reversing Rule 54(b) certification: "claims are not separate for Rule 54(b) purposes if the facts they depend on are largely the same, or stated otherwise, if the only factual differences are minor"); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 702 (7th Cir. 1984) (instructing that district court should not certify separate judgment under Rule 54(b) if separate appeals would require court of appeals to relearn the same facts in successive appeals). At this point, however, the court can and will enter one final judgment in favor of all defendants as to all claims, thus resolving those motions.

So ordered.

Date: June 3, 2008

DAVID F. HAMILTON, CHIEF JUDGE
United States District Court
Southern District of Indiana

Copies to:

Donald G. Banta
INDIANA STATE ATTORNEY GENERAL
Donald.Banta@atg.in.gov

Dwight Timothy Born
TERRELL BAUGH SALMON & BORN LLP
tborn@tbsblaw.com

William K. Burnham
SHEFFER LAW FIRM LLC
wburnham@kylaw.com

James D. Crum
COOTS HENKE & WHEELER
jcrum@chwlaw.com

Jeffrey L. Freeman
ASSISTANT JEFFERSON COUNTY ATTORNEY
jeff.freeman@louisvilleky.gov

Brandon A. Gibson
COOTS HENKE & WHEELER, P.C.
bgibson@chwlaw.com

Matthew L. Hinkle
COOTS HENKE & WHEELER
mhinkle@chwlaw.com

R. Jeffrey Lowe
KIGHTLINGER & GRAY, LLP
jlowe@k-glaw.com

Richard T. Mullineaux
KIGHTLINGER & GRAY, LLP
rmullineaux@k-glaw.com

Patrick J. Renn
prenn@smithhelman.com

Cory Christian Voight
INDIANA STATE ATTORNEY GENERAL
cory.voight@atg.in.gov